SOUTHERN ENVIRONMENTAL LAW CENTER

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June 11, 2021

VIA EMAIL

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210
contact@psc.sc.gov

Re: Comments on Proposed Pipeline Regulation

Dear Ms. Boyd:

The Southern Environmental Law Center submits these comments on behalf of itself, Upstate Forever, and the Friends of Beaverdam Creek in response to the request from the Commission Staff of April 23, 2021, asking for comments on the proposed new pipeline regulation.

As the Commission and the Staff learned during two proceedings and the workshop, local residents, communities, and the public interest all suffer serious harm due to the way that for-profit gas corporations exercise eminent domain to build new gas lines. This regulation is needed to protect private property rights, communities, ratepayers, our environment, and the State as a whole.

At the outset, it is important to emphasize that this rule is proposed to address situations where for-profit gas corporations use the power of eminent domain to seize private property against the will of the private property owner. This process is one of the most extreme intrusions upon the private rights of residents, exercised not by a public governmental entity, but by a for-profit corporation for private gain. These decisions of a for-profit corporation, backed up by the governmental force of eminent domain, disturb the rights, property, peace of mind, homes, farms, family heritage, and businesses of private property owners. The public deserves strong protections when a for-profit corporation exercises this governmental power against the public, but to date the Commission has not set out such protections in its regulations. These proposals ask the Commission to act as the protector of the rights and interests of the public.

This rule has three separate and important components: (1) transparency, public information, and notice requirements; (2) requirements that the gas corporation examine important issues and share its analysis with the public; and (3) a requirement that the Commission find that the proposed pipeline is in the public interest and not an expensive, duplicative, and unnecessary construction project that ratepayers will be required to pay for.

Each of these components is separate and stands on its own; together, they provide comprehensive important protections for private property owners, communities, and ratepayers.

Transparency and Information. These should be basic and fundamental prerequisites of any exercise of eminent domain by a for-profit gas corporation that operates beyond the sight or knowledge of the public. The public should be informed as to what is happening, private property owners should know their rights, and they should have the opportunity to ask questions. The for-profit gas corporation should not be allowed to operate in the shadows, take advantage of confused residents who have not been involved in eminent domain proceedings, and hide the corporation's overall plans in the process.

The proposed rule contains some basic transparency requirements.

First, before the property and/or easement acquisition process begins, the for-profit gas corporation should send the affected property owners and adjacent property owners a notice of the proposed line, providing the proposed route(s) and a list of the names and addresses of the property owners affected. This is the most basic information to inform the private property owners and local residents of what is proposed and who would be affected. Currently, property owners receive individual letters or calls from contract land agents with no information about what the overall project is, or who else will be affected.

Second, the notice should include a concise statement of the rights of private property owners under eminent domain law in South Carolina. This statement does not change eminent domain law in any way; it only provides a concise and helpful summary for residents, almost all of whom have never encountered this process before. It is important that the statement summarizing those rights not be long, dense, and filled with legalese. We require that accused criminals be given a short summary of their rights under criminal law in the United States. At the least, law-abiding private property owners should be informed of their rights before for-profit gas corporations attempt to use the powers of eminent domain to seize their property or to negotiate a transaction backed up by the threat of eminent domain.

Third, there should be a public hearing in the affected community where the public, including affected private property owners and ratepayers, have a chance to ask questions and learn more about the proposed gas line before the property acquisition and eminent domain process begins.

It has been communicated to the Commission repeatedly that the current system causes confusion, fear, and distrust because local residents are left in the dark and the for-profit gas corporations are able to act under the cloak of secrecy. Residents have reported that different property owners are told different things and that individuals have been misled in separate conversations with land agents. Transparency, public notice, public information, and a chance to ask questions at a hearing where everyone receives consistent information are essential to dealing with the problems of the current system. These processes govern many public institutions – including electric utilities, regulatory agencies, and governments at every level. There is no reason why they should not apply here.

At the workshop, we did not hear any legal arguments against these basic transparency and public information requirements. We understood Piedmont Natural Gas to say that it could support transparency and public notice and information. These requirements should be the absolute minimum required for new gas lines proposed by gas corporations.

One corporate representative did argue that there was no point in public disclosure and discussion, because the factors involved in deciding to build a new gas pipeline were too complicated for the public to understand. In other words, the gas utility is saying: Trust us, we're smarter than you. This is exactly the kind of thinking that has gotten South Carolina and its utilities into such deep trouble. We have seen one CEO of a major utility, SCE&G, plead guilty to federal crimes; the collapse of one of the largest proposed utility construction projects in South Carolina history; the heated controversy over the operation and future of Santee Cooper; and Duke Energy companies plead guilty to multiple coal ash crimes committed across North Carolina. According to published reports, criminal investigations continue in South Carolina into the operations of utilities and the professionals who have served them.

South Carolina has learned the hard way that the regulated utilities are not as smart as they claim to be, and that we must verify and not blindly trust. Transparency and public information should be the foundation of any regulation of the for-profit utilities.

Required Information. The proposed rule serves a second purpose. It requires that the for-profit gas corporation look at the important factors that should be studied and considered before the for-profit gas corporation decides to build a pipeline and use the force of eminent domain to build it. Indeed, we have to believe that the for-profit gas corporation has in fact conducted those studies and considered these factors before moving forward on such an expensive and intrusive project. If the corporation has not done so, the corporation certainly should be required to gather that information and consider it.

The information required by the proposed regulation includes the basic considerations that should be taken into account to assess the proposal and protect the public interest: (1) the cost of the project; (2) the impacts of the project on the environment, such as impacts on preserved natural areas and water resources; (3) the environmental justice impacts, such as impacts on communities of color, low-income communities, religious communities, farmlands, and cemeteries; (4) the estimated amount to be recovered from ratepayers; and (5) whether the pipeline is a necessary or a redundant expense and charge to ratepayers, because an electricity provider, such as the same for-profit corporate monopoly which provides electricity in addition to gas, already serves the area and can provide the same service that the pipeline would provide.

When the for-profit gas corporation has not looked at these factors, it causes itself and the public unnecessary expense and disruption. As the Commission heard, Piedmont Natural Gas proposed one or more routes that went through protected natural areas and impacted protected species, without being fully aware of the implications of its route, and was required repeatedly to redraw its route before withdrawing its plans entirely. The proposed Dominion River Neck to Kingsburg pipeline has impacts on heirs property and a minority community.

In most instances, it should be expected that the for-profit gas corporation has examined these factors in deciding to go forward. They are the factors we should expect any for-profit gas corporation to examine before it proposes to incur millions of dollars of expense, charge ratepayers for the pipeline, disrupt a community and its peace of mind, and utilize the threat and/or power of eminent domain.

And the public should have the benefit of this analysis. It should not be conducted by the corporation in private and behind closed doors and withheld from the public. Sunshine is the best way to ensure that major decisions are made well and are well founded. Here, it will benefit the for-profit gas corporations themselves, the local community, and the public at large if the public is provided this information in connection with the proposal of a new pipeline. At the public hearing, the corporation will have a chance to explain its studies, and the public will have a chance to ask questions.

At the workshop, the main argument by the for-profit gas corporations was that providing this information was "red tape" or "unnecessary bureaucracy." These phrases are shopworn rhetorical devices used to avoid dealing with the facts of proposals. This information is not red tape or unnecessary bureaucracy. It is information the corporation has already developed or should have developed. All that is required is that the for-profit gas corporation share this information with the public. If the corporation does not prepare this information up front, the corporation will have to deal with it later, to its embarrassment – as we have seen in the case of these two new pipelines. There is no reason why the for-profit gas corporation should withhold this information from the public. The corporation and the public will benefit from this information being disclosed and subject to advance scrutiny.

Commission Approval. Public notice, basic information, and public hearings are important. So is requiring the disclosure of fundamental information concerning the costs and impacts of a proposed gas pipeline. But as a separate point, it is also important that the Commission protects the public by making a determination that the proposed gas pipeline is in the public interest and that it is necessary before a community is disrupted and private property rights are overridden by a for-profit gas corporation.

Through these pipeline proposals, the for-profit gas corporations are proposing to override some of our most precious rights – our private property rights and our peace of mind in our homes and farms. The for-profit gas corporations are also expecting the ratepayers to pay for the corporation's actions and provide the corporations a profit. It is important to emphasize that these decisions are being made by for-profit private entities answerable only to their parent corporation super monopolies that control both electricity and gas monopolies in our State. Their incentives are a matter of internal decisions made not by public bodies answerable to the public, but by corporate bureaucracies with the interests of their corporate parents in mind.

Because these for-profit corporations are using the governmental power of eminent domain to override the rights of private residents and because they are expecting the public to pay them for doing so, it is important that a public body review these decisions before they are

carried out. In South Carolina, the Public Service Commission is the agency charged with playing that role.

At the workshop, two principal arguments were made against this aspect of the proposed rule.

First, the corporations argued that the Commission lacks the authority to adopt a rule requiring Commission pre-approval. As we have explained and set forth below, in fact the governing statute grants the Commission broad and ample authority to put in place such a requirement. One gas corporation representative suggested that because the legislature had enacted Commission pre-approval for electricity powerlines but had not done so for gas pipelines, the Commission had no statutory authority to adopt the proposed requirement. As we set out below, that argument is likewise wrong. In fact, the Commission has in the past adopted by regulation requirements for gas pipelines that existed in statute for electricity utilities but not for gas utilities; and the Legislature does not repeal express broad authorization granted the Commission to regulate gas utilities by what it does or does not require specifically for electric utilities.

In any event, before the regulation goes into place, the Legislature will by statute review it. The Legislature itself can act if this requirement is against legislative intent.

Second, it was argued that this aspect of the proposed rule would violate South Carolina's eminent domain law because property owners have a time-limited opportunity to challenge the necessity of eminent domain when a corporation seeks to exercise that power. However, the proposed rule is written expressly to have no impact whatsoever on eminent domain law or its operation. In Subsection H, it provides: "The determination of the Commission is without prejudice to and does not reduce or alter in any way the rights of property owners and does not in any way alter or amend any of the laws of South Carolina dealing with eminent domain."

This requirement is in no way contrary to South Carolina's eminent domain law. The proposed rule clearly provides that it has no impact whatsoever on the rights of private property owners under existing eminent domain law.

For all these reasons and the reasons expressed in the Commission proceedings and the workshop, the Commission should adopt this rule to protect South Carolina, its wellbeing, its private property owners, its ratepayers, and its residents.

Below, we deal directly with the legal issues raised at the workshop.

Legal Issues

Commission Authority. The Commission adopted its existing regulations governing gas service, 103-400 *et seq.*, pursuant to the agency's broad authority under S.C. Code Ann. § 58-5-210. That Code Section vests the Commission with broad power and authority to

> supervise and regulate the rates and service of every public utility in this State as defined in this Act, together with the power, after hearing, to *ascertain and fix such just and reasonable standards, classifications, regulations, practices* and

> measurements of service to be *furnished, imposed, observed and followed by every public utility* in this State, and the State hereby asserts *its rights to regulate the rates and services* of every "public utility" as herein defined.

S.C. Code Ann. § 58-5-210 (emphases added). This Code Section and its Chapter do not deal with electric utilities, which are separately regulated under Chapter 27 of Title 58. *See* S.C. Code Ann. 58-5-10(4) (defining public utility to include companies delivering natural gas distributed or transported by pipe, furnishing or supplying heat other than by means of electricity, or providing water, sewerage collection, sewerage disposal, or street railway service, to the public or any portion thereof for compensation).

Pursuant to this broad grant of authority, the Commission has already extensively regulated gas utilities. In adopting those rules, the Commission has made clear that it is in no way precluded from "altering, amending or revoking them in whole or in part, or from requiring any other or additional service, equipment, facility or standard, either upon complaint or upon its own motion, or upon the application of the utility." Rule 103-400.B.

The Commission's existing rules broadly cover "any person, firm, partnership, association, establishment, or corporation which is now or may hereafter become engaged as a public utility in the business of furnishing gas to any gas customer within the State of South Carolina, except where municipalities or their agents, and/or any gas authorities are specifically exempted by statute." Rule 103-401.1.[1]

The stated purpose of the Commission's rules for "Gas Systems" – *i.e.*, Rules 103-400 *et seq.* – is to "define good practice" and to "insure adequate and reasonable service." Rule 103-401.2.

Indeed, the Commission has already issued regulations governing the siting and approval of new gas pipelines in ways not expressly set out in statute, but authorized under the broad grant of authority contained in S.C. Code Ann. § 58-5-210. Under Rule 103-404, the Commission has required gas utilities to obtain pre-approval of new gas pipelines, while exempting certain categories of proposed pipelines from pre-approval. The gas pipelines at issue here fall within those exemptions. However, just as the grant of authority under S.C. Code Ann. § 58-5-210 provides the basis for the Commission to regulate gas utilities as it did in Rule 103-404, so the

[1] The statutory exemptions contained in Article I (general provisions) of Chapter 5 (gas, heat, water, sewer and street railway companies) are inapplicable here. They cover public utilities owned or operated by or for any municipality or regional transportation authority (Section 58-5-30); public utilities and pipeline companies engaged in extracting, processing, distributing or selling landfill gas, where the gas is provided to fewer than 20 customers (Section 58-5-35); sellers at wholesale of water or water-borne waste disposal services to municipalities (Section 58-5-40); contracts entered prior to March 24, 1922 (Section 58-5-50); franchises or ordinances setting rates, tolls, charges or fares that were established prior to March 24, 1922 (Section 58-5-60).

Commission has the same broad statutory authority to adopt the proposed rule to address the problems and concerns faced by communities in South Carolina.

During the workshop, one utility representative argued that because the Legislature had enacted specific statutory requirements for the pre-approval of electric utility powerlines and had not done so for gas pipelines, the Commission lacked authority to adopt a rule putting in place a pre-approval process for gas pipelines. But the action of the Legislature in another Chapter dealing with electric utilities has nothing to do with the authority of the Commission under a separate Chapter that governs gas utilities. The broad language contained in S.C. Code Ann. § 58-5-210 is plain on its face and speaks for itself. The Commission has previously used this very broad authority to adopt pre-approval requirements for new gas pipelines that are not specifically set out in statute. The Commission is free, under that same broad grant of authority, to enact new and different requirements applicable to new proposed gas pipelines. The Commission is empowered, under its broad authority, to "define good practice" for gas utilities.

Moreover, S.C. Code Ann. § 1-23-120 should eliminate any concern about the Commission supposedly exceeding the Legislature's intent as to the Commission's authority. Any rule adopted by the Commission will be subject to legislative review and can be disapproved by the Legislature.

Eminent Domain. Contrary to the preliminary comments of Piedmont Natural Gas, the proposed disclosure and approval provisions dovetail with South Carolina's eminent domain procedures. Nothing in Title 28 prevents or is threatened by a separate process for informing affected community members and ensuring a proposed pipeline is in the public interest prior to the possible or actual exercise of eminent domain by the for-profit gas corporation.

As noted above, the proposed regulation is written to be absolutely clear that it preserves South Carolina's eminent domain laws:

> The determination of the Commission is without prejudice to and does not reduce or alter in any way the rights of property owners and does not in any way alter or amend any of the laws of South Carolina dealing with eminent domain.

Proposed 103-495(H). The proposed regulation is written to be in harmony with the existing eminent domain law of South Carolina.

This proposed regulation does not impact existing eminent domain laws but is instead based on the Commission's broad authority to regulate gas utilities and their services. S.C. Code Ann. § 58-5-210. The same is true of the Commission's existing regulations requiring a certificate of public convenience and necessity for new gas facilities under some circumstances, S.C. Code Ann. Regs. 103-404, and neither the existing regulation nor the proposed one conflicts with South Carolina's eminent domain law.

Indeed, every aspect of the proposed regulation is consistent with the normal eminent domain procedure. First, the information-gathering and analysis provisions in subpart A have no bearing on eminent domain. They merely require the utility to evaluate the effects of their proposed pipeline and share that information with the Commission and the public. These procedures serve to inform the Commission and affected property owners, but have no impact on eminent domain.

Likewise, the notice and hearing provisions of subparts C, D, E, and I do not in any way change eminent domain procedures. They ensure that the public and property owners in the path of a pipeline have notice and an opportunity to voice their opinions on a project and its effect on them.

The same is true of the Commission's review of the proposed pipeline set out in subparts B and F. Just like the transparency and information requirements, the Commission's review takes place before, and separate from, eminent domain actions. The proposed regulation sets out actions and decisions that must be made prior to the eminent domain process. Once those conditions are satisfied, any exercise of eminent domain, or challenge to the exercise of eminent domain, would proceed exactly as laid out in Title 28.

The proposed regulation is entirely consistent with the remedy for landowners set out in Title 28. S.C. Code Ann. § 28-2-470 states that "[a]n action challenging a condemnor's right to condemn must be commenced in separate proceedings filed in the court of common pleas." The proposed regulation expressly provides that the proceedings before the Commission are without prejudice to eminent domain proceedings and that the regulation in no way impacts or alters South Carolina's eminent domain law. An action under Section 28-2-470 can be brought and proceed just as it would in the absence of the proposed regulation. If the Commission finds that the pipeline is in the public interest and otherwise satisfies the criteria laid out in subpart F, individual landowners can bring a claim under § 28-2-470, just as they can now.

Nor does the proposed regulation disturb the basic operation of eminent domain. Gas companies are still bound to undertake condemnation, when they do, by the procedures of Title 28. S.C. Code Ann. § 28-2-210. Apportionment of compensation and disputes as to compensation amount will still proceed under § 28-2-460 and § 28-2-310 *et seq.* respectively.

It is irrelevant that some cases have held the provision of utilities like electricity or railroads, as a general matter, is a public use. *See Bookhart v. Central Elec. Power Coop., Inc.*, 219 S.C. 414, 426 (1951); *Twin City Power Co. v. Savannah River Elec. Co.*, 163 S.C. 438, 471 (1930); *Riley v. Charleston Union Station Co.*, 71 S.C. 457, 486 (1905) (cited by Piedmont Natural Gas, reply comments at 6, April 14, 2021). The provision of public utilities may as a general matter be a public use, but it is a separate question whether a particular pipeline is in the public interest or is an expensive project duplicative of service already provided by an electricity provider, such as the for-profit gas corporation's sole owner and parent corporation. As well,

public transparency, notice, and information are issues totally separate from the general notion that the provision of utilities is a public use.

Conclusion

The proposed regulation merely seeks to ensure that communities, individual residents, and private property owners are treated with respect, given access to necessary information, and informed of their rights, and to ensure that when for-profit gas corporations seek to use the tremendous power of eminent domain, they act with transparency and seize private property and impose expenses upon ratepayers only when the corporations are acting in the public interest and not duplicating services. South Carolinians deserve no less.

We thank the Commission and the Staff for their careful attention to these issues over the last year and for their consideration.

Sincerely,

Frank S. Holleman III
Senior Attorney